Office-Supreme Court, U.S.
FILED
FEB 12 1981
ALEXANDER L. STEVAS,
CLERK

80-1361

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

M/G TRANSPORT SERVICES, INC. - Petitioner

versus

CITIZENS FIDELITY BANK AND TRUST COMPANY, Executor Under the Will of Thomas L. Shanesy, and
RAYMOND E. POTTER, SR., Administrator of the Estate of Martha Jo Kinser - Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

W. SCOTT MILLER, JR.
MILLER & MILLER
Suite 602, One Riverfront Plaza
Louisville, Kentucky 40202
(502) 589-6240
Counsel for Petitioner, M/G Transport Services, Inc.

NATHAN S. LORD
Of Counsel

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

After prohibiting further prosecution of two diversity cases by the restraining order in a multi-claim, inadequate fund exoneration or limitation of liability admiralty case the district court later ordered that the limitation case be "consolidated" with the diversity cases for jury trial on the issues of "liability and damages" (thus requiring jury trial of the exoneration and concursus issues of the admiralty case) but not limitation itself:

1. Is the second order a mere calendar order or does it so modify the restraining order that the second order can be appealed under 28 U.S.C. § 1292(a)(1)?

The United States Court of Appeals for the Sixth Circuit held that the second order cannot be appealed.

Petitioner contends that it can.

2. Can there be an appeal concerning the coercive equitable parts of an admiralty limitation case under 28 U.S.C. § 1292(a)(1) that could not also be appealed under 28 U.S.C. § 1292(a)(3)?

The United States Court of Appeals for the Sixth Circuit *may* have held No.

The Petitioner contends the answer is Yes.

CORPORATE AFFILIATES OF PETITIONER

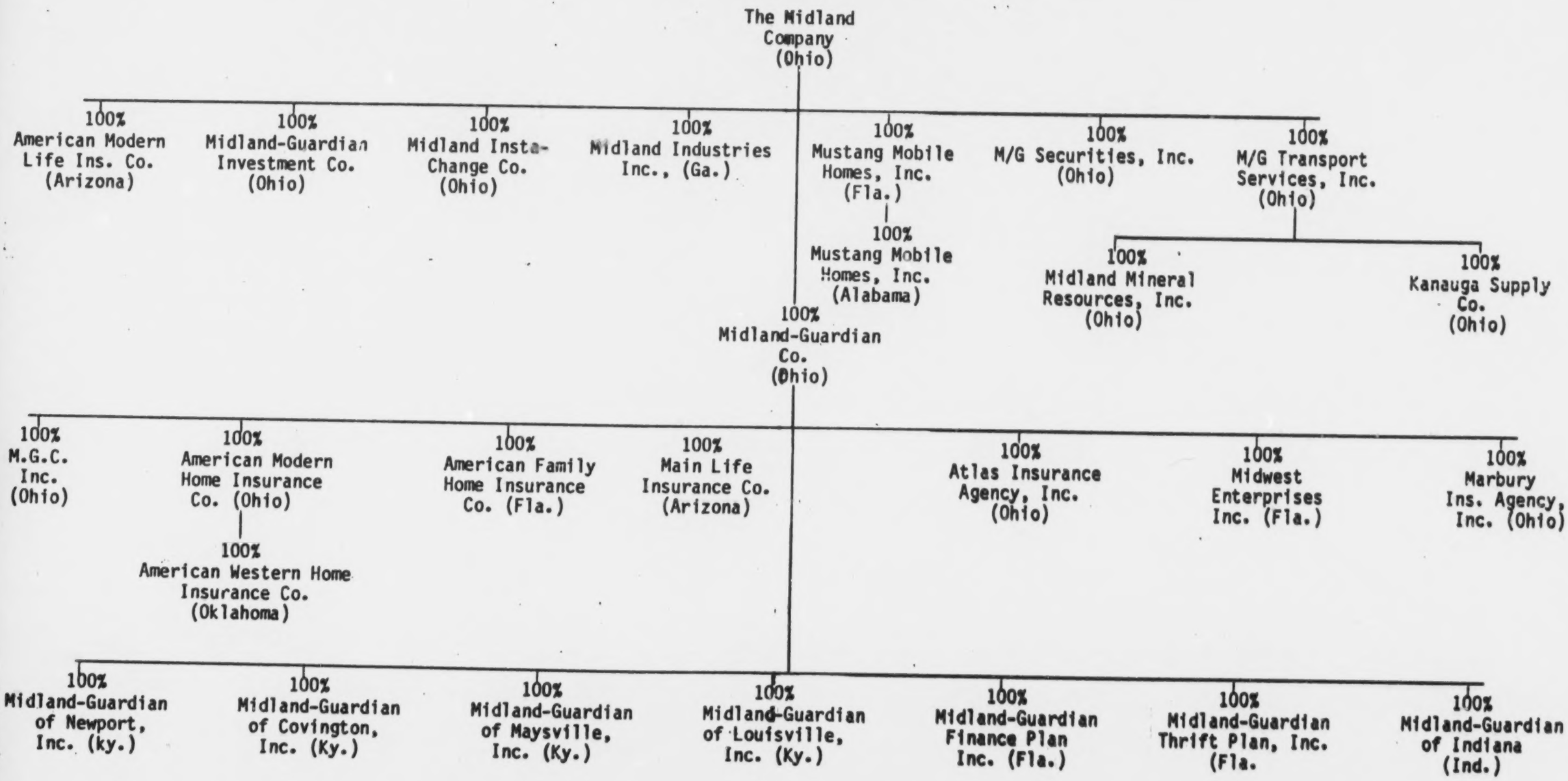
Statement Required By Supreme Court of the United States Rule 28.1:

Petitioner, M/G Transport Services, Inc., is a wholly-owned subsidiary of The Midland Company. Midland Mineral Resources, Inc., and Kanauga Supply Company are wholly-owned subsidiaries of the Petitioner, M/G Transport Services, Inc. All are incorporated in the State of Ohio.

The remaining affiliates of The Midland Company are all wholly-owned subsidiaries. They and their affiliates, if any (all of which are in turn wholly-owned subsidiaries), are shown on this organization table (states of incorporation indicated parenthetically):

Exhibit 1

Organizational Chart



PARTIES BELOW

Statement Required By Supreme Court of the United States Rule 21.1(b):

Appellees in the United States Court of Appeals for the Sixth Circuit were Citizens Fidelity Bank and Trust Company, Executor under the Will of Thomas L. Shanesy, and Raymond E. Potter, Sr., Administrator of the Estate of Martha Jo Kinser.

The two Appellees below are also plaintiffs, respectively, in the two diversity cases consolidated for purposes of jury trial with this limitation case.

American Economy Insurance Company has intervened as a plaintiff in one of those diversity cases. Meridian Mutual Insurance Company and Allstate Insurance Company have intervened as defendants in one or both of those cases.

Petitioner, M/G Transport Services, Inc., has served copies of all appellate papers on all three Intervenors as well as on the Appellees.

PREVIOUS PAGE WAS BLANK

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Corporate Affiliates of Petitioner	ii
Parties Below	v
Table of Authorities	vii
Opinion Below	1
Jurisdiction	2
Constitutional and Statutory Provisions and Court Rules Involved	2
Statement of the Case	2
Argument	7
Conclusion	16
Appendix	17

TABLE OF AUTHORITIES

Cases:

PAGE

American Motors Corporation v. *F.T.C.*, 601 F. 2d 1329 (6th Cir. 1951) 6

Anderson v. *Nadon*, 360 F. 2d 53, 56 (9th Cir. 1966). 8

Baltimore Contractors, Inc. v. *Bodinger*, 348 U. S. 176 (1955) 12

Complaint of Mucho K, Inc., 578 F. 2d 1156 (5th Cir. 1978) 8

Curtis Bay Towing Co. v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273, 275 (2d Cir. 1947) 8, 13

Emerick v. *Lambert*, 187 F. 2d 786 (6th Cir. 1951) 9, 10, 14

Helena Marine Service, Inc., v. *Sioux City and New Orleans Barge Lines, Inc.*, 564 F. 2d 15 (8th Cir. 1977) 8

In Re Lady D, 416 F. 2d 454 (6th Cir. 1969) 8, 9

In Re Petition of Lake Tankers Corp., 232 F. 2d 573, *affirmed on rehearing in banc*, 235 F. 2d 783 (2d Cir. 1956) 7

Johnson v. *Manhattan Ry.*, 289 U. S. 479, 496-97 (1933) 11

Lake Tankers Corp. v. *Henn*, 354 U. S. 147 (1957).. 7

Norwich Co. v. *Wright*, 13 Wall. (80 U. S.) 104, 119-20, 124, 125 (1872) 10

Penoro v. *Rederi A/B Disa*, 376 F. 2d 125 (2d Cir. 1967), *cert. denied sub. nom Rederi A/B Disa* v. *Cunard SS Co.*, 389 U. S. 852 (1967) 12, 13

Pershing Auto Rentals, Inc. v. *Gaffney*, 279 F. 2d 546, 548 (5th Cir. 1960) 7, 9

Petition of Lake Tankers Corp., 137 F. Supp. 311 (S.D. N.Y. 1955) 7

Petition of Oskar Tiedemann and Co., 253 F. 2d 233 (3rd Cir. 1958) 8

Petition of World Tradeways Shipping, Ltd., 373 F. 2d 860 (2d Cir. 1967) 13

Cases (Cont'd):

PAGE

Schoenamsgruber v. *Hamburg American Line (The Oakland)*, 294 U. S. 454 (1935) 14, 15

Statutes:

28 U.S.C. § 1292(a)(1) 5, 9, 11, 14, 15
28 U.S.C. § 1292(a)(3) 8, 9, 10, 15
28 U.S.C. § 1292(b) 6, 13
28 U.S.C. § 1333..... 11
46 U.S.C. §§ 181-89 3
46 U.S.C. § 183(a) .....App. 18
46 U.S.C. § 183(f) .....App. 19
46 U.S.C. § 185 .....12, 14
46 U.S.C. § 188 .....App. 20
Judiciary Act of 1789 1 Stat. 73, 76-77 (now 28 U.S.C. § 1333) 11

Court Rules:

Fed. R. Civ. P. Supp. F(2) .....App. 21
Fed. R. Civ. P. Supp. F(3) .....3, 11, 12, App. 21
Fed. R. Civ. P. Supp. F(9) .....App. 21
Admiralty Rule 54, 13 Wall. (80 U.S.) xii-xiii (1872) 11
Admiralty Rule 56, 13 Wall. (80 U. S.) xiii (1872) 10
District Court for the Western District of Kentucky Rule 5(a)(3). (1973) 4

Treatises:

5 Moore, Lucas & Wicker, *Moore's Federal Practice*, par. 42.02 at 42-21–42-22 (2d ed. 1980).... 11
9 Wright & Miller, *Federal Practice and Procedure*, § 2382 at 255 (1971) 11

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

M/G TRANSPORT SERVICES, INC. - - *Petitioner*

v.

CITIZENS FIDELITY BANK AND TRUST COMPANY, Executor Under the Will of Thomas L. Shanesy, and
RAYMOND E. POTTER, SR., Administrator of the Estate of Martha Jo Kinser - *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, M/G Transport Services, Inc., respectfully prays that a writ of certiorari issue to review the final order and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 17, 1980.

OPINION BELOW

The order and opinion of the Court of Appeals, not yet reported, is in the Appendix hereto. The pertinent memorandum and orders of the District Court for the Western District of Kentucky also appear in that Appendix.

JURISDICTION

The final order of the Court of Appeals for the Sixth Circuit was dated and entered on November 17, 1980, and this Petition for Certiorari was filed within 90 days on that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND COURT RULES INVOLVED

(See Appendix for Text)

28 U.S.C. § 1292(a)(1)
28 U.S.C. § 1292(a)(3)
28 U.S.C. § 1333
46 U.S.C. § 183(a)
46 U.S.C. § 183(f)
46 U.S.C. § 185
46 U.S.C. § 188

Fed. R. Civ. P. Supp. F (2)
Fed. R. Civ. P. Supp. F (3)
Fed. R. Civ. P. Supp. F (9)

Admiralty Rule 54, 13 Wall. (80 U.S.) xii-xiii (1872)
Admiralty Rule 56, 13 Wall. (80 U.S.) xiii (1872)

District Court for the Western District of Kentucky Rule 5(a)3. (1973)

STATEMENT OF THE CASE

A barge in the push-tow of the towboat of the Petitioner, M/G Transport Services, Inc., (hereinafter called "M/G"), the M/V MARK EASTIN, collided with a sailboat, the occupants of which were the de-

cedents Martha Jo Kinser and Thomas L. Shanesy, on August 21, 1977, on the Ohio River near Louisville, Kentucky. Both decedents died in the collision.

On July 28, 1978, Citizens Fidelity Bank and Trust Company, Executor under the Will of Thomas L. Shanesy, Mary Ellen Shanesy, widow, Catherine Ann Shanesy, daughter, and James W. Shanesy, son, Plaintiffs (hereinafter collectively called "Shanesy"), sued M/G for wrongful death (and a surviving tort claim) in diversity in the United States District Court for the Western District of Kentucky, Civil Action No. C-78-0291-L(A) (R. 2-4).

On August 14, 1978, Raymond E. Potter, Sr., Administrator of the estate of Martha Jo Kinser, Kerry Kinser, son, and Kimberly Kinser, infant daughter by her next friend Roy Kinser, Plaintiffs, (hereinafter collectively called "Kinser") sued M/G and Shanesy in diversity for wrongful death (and a surviving tort claim) in the United States District Court for the Western District of Kentucky, Civil Action No. C-78-0306-L(A) (R. 2-4).

The gravaman of each suit was the alleged faulty navigation of the defendant or defendants.

On September 11, 1978, under the Limitation Act, 46 U.S.C. §§181-189 and Fed. R. Civ. P. Supp. F, M/G petitioned the Western District of Kentucky (Civil Action No. 78-0360-L(B)) for exoneration from or limitation of liability to the value of its towboat, M/V MARK EASTIN (R. 2-1). The District Court's subject matter jurisdiction was founded on 28 U.S.C. § 1333. On the same day, the Honorable Thomas A.

Ballantine, Jr., Judge of the United States District Court for the Western District of Kentucky, restrained (R. 4-1):

> ". . . all claimants with claims arising out of or related to said maritime casualty . . . from filing suits or further prosecuting existing suits against said vessel or Petitioner (M/G) as owner and operator of said vessel and/or taking part in any administrative action or adversary proceeding or prosecuting their respective claims until the hearing and determination of this proceeding...."

On September 12, 1978, the Honorable Charles M. Allen, Chief Judge, United States District Court for the Western District of Kentucky, recused himself in the two diversity cases because of stock that he owned in the Citizens Fidelity Bank and Trust Company; he then reassigned these cases to Judge Ballantine, under his authority in Rule 5(a)3. of the Rules of the District Court for the Western District of Kentucky, then in effect. Request for Admission. (R. 79-1).

Shanesy's diversity complaint and limitation claim (R. 8-1) both seek damages totalling $3,375,221.78. Kinser's diversity complaint and limitation claim (R. 6-2) both seek damages totalling $1,510,000.00. The limitation fund is $795,090.62 (R. 3-1).

On July 7, 1980, Judge Ballantine ordered the two diversity cases "consolidated" with the limitation case for a jury trial "on the issues of liability and damages," and that M/G's "petition for limitation or exoneration should be denied until such time as the Plaintiff's (Shanesy's and Kinser's) common law actions

have been concluded." The last quotation is from Judge Ballantine's Memorandum and Order of July 7, 1980, (R. 48-3). The same day he also ordered (R. 49-1):

> [T]hat these cases be set for trial before a jury on the issues of liability and damages on December 1, 1980, at the hour of 9:30 a.m. The case will then be tried on the issue of limitation, if necessary.

On July 21, 1980, M/G appealed from the foregoing orders under 28 U.S.C. § 1292(a)(1) on the ground that they modified the Restraining Order of September 11, 1978 (R. 50-1). Thereafter, Shanesy moved the Sixth Circuit to dismiss the appeal.

On November 17, 1980, the Sixth Circuit dismissed M/G's appeal for want of subject matter jurisdiction. The court stated (see Appendix):

> This Court has held that in admiralty cases, orders consolidating actions for trial and orders refusing to enjoin further proceedings where there is a pending limitation action are preliminary steps to bring both actions to final issue and are not appealable pursuant to 28 U.S.C. 1292(a)(3). *Emerick* v. *Lambert,* 187 F. 2d 786 (6th Cir. 1951). Further the general view is that orders relating to the delay of actions before admiralty courts, pending the outcome of some proceeding, are not appealable pursuant to 28 U.S.C. 1292(a)(1) *Penoro* v. *Rederi A/B Disa,* 386 [*sic.* Should be 376] F. 2d 125, *cert. denied sub. nom Rederi A/B Disa* v. *Cunard SS Co.,* 389 U. S. 852 (1967). The general principle here is that where a court stays a pro-

ceeding on its own docket it is not an injunction but merely a calendar order issued under the courts inherent power to regulate its own business. *Penoro* v. *Rederi A/B Disq, supra.* Only where a major portion of the relief sought by the complaint is granted and then modified will an appeal lie under 1292(a)(1). Pretrial management orders like the one at bar are generally excepted. See *American Motors Corporation* v. *F.T.C.,* 601 F. 2d 1329 (6th Cir. 1979).

The trial date now is June 9, 1981.

Note On Parties and Record

M/G did not appeal from an order applicable to the diversity cases because there was no preliminary injunction or restraining order in those two cases upon which appellate jurisdiction could rest under 28 U.S.C. § 1292(a)(1).

The District Court invited M/G to seek discretionary review by the Sixth Circuit by granting *sua sponte* the certificate required by 28 U.S.C. § 1292(b). M/G did not accept the invitation. Hence, M/G takes the position that the Intervening Plaintiff and the Intervening Defendants described in this Petition under this Court's Rule 21.1(b) as Parties Below were not Appellees in the Court of Appeals. By the same reasoning, the record on appeal was the record of the limitation case, not the diversity cases.

ARGUMENT

1. The Decision Below On the First Question Presented Conflicts With the Implicit Holding of a Decision of This Court.

Lake Tankers Corp. v. *Henn,* 354 U. S. 147 (1957), came to this Court on a Writ of Certiorari to review a decision of the Second Circuit sustaining an order of the Southern District of New York. The District Court originally restrained prosecution of state common law actions arising from a maritime casualty when Lake Tankers filed a petition for exoneration or limitation. Later, the District Court modified its restraining order to allow one of the state actions to proceed. *Petition of Lake Tankers Corp.,* 137 F. Supp. 311 (S.D. N.Y. 1955).

Lake Tankers appealed under 28 U.S.C. § 1292(a)(1) to the Second Circuit, which affirmed the District Court. *In Re Petition of Lake Tankers Corp.,* 232 F. 2d 573, *affirmed on rehearing in banc,* 235 F. 2d 783 (2d Cir. 1956).

Had not the interlocutory appeal from the District Court been properly in the Second Circuit under 28 U.S.C. § 1292(a)(1), there would have been nothing for this Court to review by certiorari in *Lake Tankers.* The Fifth Circuit so held in *Pershing Auto Rentals, Inc.* v. *Gaffney,* 279 F. 2d 546, 548 (5th Cir. 1960).

2. The Decision Below On the First Question Presented Conflicts With the Decisions of Other Courts of Appeals.

The Second Circuit, *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.,* 159 F. 2d 273, 275 (2d Cir. 1947), the Third Circuit, *Petition of Oskar Tiedemann and Co.,* 253 F. 2d 233 (3d Cir. 1958), the Fifth Circuit, *Complaint of Mucho K, Inc.,* 578 F. 2d 1156 (5th Cir. 1978), the Eighth Circuit, *Helena Marine Service, Inc.* v. *Sioux City and New Orleans Barge Lines, Inc.,* 564 F. 2d 15 (8th Cir. 1977) and the Ninth Circuit, *Anderson* v. *Nadon,* 360 F. 2d 53, 56 (9th Cir. 1966) have all ruled on the merits on interlocutory appeals as matters of right under 28 U.S.C. § 1292(a)(1) from orders changing or refusing to change Limitation Act restraining orders granted under 46 U.S.C. § 185 and Fed. R. Civ. P. Supp. F(3).

Even the Sixth Circuit has ruled on the merits on an interlocutory appeal of right from an order refusing to modify a previously-granted Limitation Act injunction. *In Re Lady D,* 416 F. 2d 454 (6th Cir. 1969).

3. The Seeming Holding Below as to the Second Question Presented Conflicts With a Decision of This Court and Is Not Followed By Other Circuits.

The Sixth Circuit's opinion about the effect of 28 U.S.C. § 1292(a)(3) is ambiguous. The opinion states (see Appendix; emphasis added):

> This Court has held that in admiralty cases, orders consolidating actions for trial and orders refusing to enjoin further proceedings where there

> is a pending limitation action are preliminary steps to bring both actions to final issue and are *not appealable pursuant* to 28 U.S.C. 1292(a)(3). *Emerick* v. *Lambert,* 187 F. 2d 786 (6th Cir. 1951).

M/G has no quarrel with the observation that 28 U.S.C. § 1292(a)(3) does not authorize appeals in admiralty cases from orders granting or denying preliminary injunctions or modifications thereof because that provision authorizes interlocutory appeals only from findings concerning liability in bifurcated admiralty cases when assessment of damages is delayed to a second hearing or trial.

M/G does not agree with the quoted statement if it means that ". . . orders refusing to enjoin further proceedings . . . are preliminary steps . . . and are not appealable. . . ." The *Emerick* case cited in the statement squarely holds, 187 F. 2d at 788, that there can never be an appeal from a Limitation Act injunction (or modification thereof) under 28 U.S.C. § 1292(a)(1) because 28 U.S.C. § 1292(a)(3) provides the only method for any kind of interlocutory appeal in any admiralty case. If *Emerick* is correct, this Court lacked subject matter jurisdiction to decide *Lake Tankers. Pershing Auto Rentals,* 279 F. 2d at 548.

Although the Sixth Circuit silently and secretly killed and buried *Emerick* by *In Re Lady D,* 416 F. 2d 454 (6th Cir. 1969), which considered on the merits an interlocutory appeal of an order refusing to modify a previously-granted Limitation Act injunction, that

court's opinion in this case has resurrected *Emerick* by citing it without restriction or change.

M/G used the word *"may"* in its Second Question Presented because it does not know what the Sixth Circuit meant by the reference to 28 U.S.C. § 1292(a)(3). M/G would be an anomalous position were it to prevail in this Court, return to the Sixth Circuit for argument on the merits of its interlocutory appeal, and there be barred by a born-again *Emerick* in all of its original erroneous raiment.

If *Emerick* remains authority in the Sixth Circuit, that court could hold on remand from this Court that this Court's ruling on the First Question Presented was academic and moot.

4. The Decision Below Violates the Concept of Nationwide Uniformity of the Administration Maritime Law By Federal Courts and Treats Saving-To-Suitors Clause State Court Plaintiffs Differently From Saving-To-Suitors Clause Federal Diversity Plaintiffs.

The United States Limitation Act, unlike the original English one, gave some of equity's injunctive power to federal admiralty courts. Therefore, matters in exoneration in limitation cases are tried in admiralty limitation cases in this country, although the original English limitation procedure called for trial in equity of only the limitation issue and required the vessel owner to admit liability. *Norwich Co.* v. *Wright,* 13 Wall. (80 U. S.) 104, 119-20, 124, 125 (1872). *Cf.* Admiralty Rule 56, 13 Wall (80 U. S.) xiii (1872).

Furthermore, the federal admiralty court in this country has the power to restrain the further prosecution of claims outside the limitation case. Admiralty Rule 54, *ibid.* at xii-xiii. Fed. R. Civ. P. Supp. F(3).

28 U.S.C. § 1292(a)(1) is the method Congress has adopted to deal with review of interlocutory injunctions. Equity, unlike law, did not have a strong policy against appeals of interlocutory matters, and Congress has not seen fit to change this policy. What qualifies as an appealable order under 28 U.S.C. § 1292(a)(1) should be the same throughout the United States, especially in cases not involving state law.

The diversity cases consolidated with this limitation proceeding were Savings-To-Suitors Clause cases in federal court because of the fortuity of diversity. The Savings-To-Suitor Clause, Judiciary Act of 1789, § 9, 1 Stat. 73, 76-77 (now 28 U.S.C. § 1333), has never distinguished between state or federal diversity cases.

The consolidation added nothing to the two diversity cases.

> [C]onsolidation is permitted as matter of convenience and economy of administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.

Johnson v. *Manhattan Ry.*, 289 U. S. 479, 496-497 (1933). 9 Wright & Miller, *Federal Practice and Procedure,* § 2382 at 255 (1971); 5 Moore, Lucas & Wicker, *Moore's Federal Practice,* par. 42.02 at 42-21–42-22 (2d ed. 1980).

The magic of consolidation does not convert to a mere pretrial management order an order which allows jury trial of two Savings-To-Suitors Clause cases any further prosecution of which had previously been wholly restrained. It goes without saying that there would be no way a federal district court sitting in exoneration or limitation proceedings could "manage" —pretrial or otherwise—state court Savings-To-Suitors Clause cases.

The Sixth Circuit's opinion in this case as to the First Questions Presented by this Petition relies on *Penoro* v. *Rederi A/B Disa,* 376 F. 2d 125 (2d Cir. 1967), *cert. denied sub. nom Rederi A/B Disa* v. *Cunard SS Co.,* 389 U. S. 852 (1967), to support the "calendar order" part of its holding. *Penoro,* a perfectly sound case, involved a stay pending arbitration under a charter party which allegedly controlled a claim over by the vessel owner against the stevedore in a pre-1972 longshoreman's case. *Penoro* is in accord with *Baltimore Contractors Inc.* v. *Bodinger,* 348 U. S. 176 (1955).

Both *Penoro* and *Baltimore Contractors* dealt with the issue of the fictional injunction—first made possible by the procedural merger of law and equity in the Federal Rules of Civil Procedure. There is nothing fictional about an injunction under 46 U.S.C. § 185 and Fed. R. Civ. P. Supp. F(3) whether it restrains state court proceedings or federal court proceedings. Indeed, it is theoretically possible for a limitation case injunction momentarily to restrain proceedings in this Court. A diversity Savings-To-Suitors Clause case on

discretionary interlocutory appeal, 28 U.S.C. § 1292(b), could be in this Court on certiorari when an exoneration or limitation proceeding involving the same maritime disaster is filed. M/G, of course, makes no prediction about the likelihood or outcome of such a situation, but its occurrence is possible. It does not logically follow that such an injunction would be fictional.

The Second Circuit has not confused the *Penoro* situation with the kind here present. The panel in *Penoro* consisted of Judges Friendly, Anderson and Feinberg; Judge Anderson wrote the opinion (decided April 3, 1967). *Penoro,* 376 F. 2d 125, 126. On March 15, 1967, the same three Judges (Judge Feinberg wrote the opinion) decided *Petition of World Tradeways Shipping, Ltd.,* 373 F. 2d 860 (2d Cir. 1967), which reaffirmed *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.,* 159 F. 2d 273 (2d Cir. 1947), cited under the second heading in the Argument of this Petition.

Both *Penoro* and *World Tradeways* were argued in February, 1967. By the logic of the Sixth Circuit *Penoro* would have overruled *World Tradeways* and *Curtis Bay;* it did not.

The Sixth Circuit characterized the District Court's order modifying the restraining order as ". . . merely a calendar order . . ." because it did not modify the grant of a ". . . major portion of the relief sought by the complaint. . . ."

The complaint for exoneration from or limitation of liability to the value of the vessel prayed for a re-

straining order which would make all other proceedings against M/G "cease," 46 U.S.C. § 185, and force claimants to try the issues of M/G's liability to them in the exoneration part of the limitation proceeding. The restraining order granted that prayer. The "calendar order" deprived M/G of that major portion of the relief already granted.

The Sixth Circuit's Lazarus-like *Emerick* v. *Lambert,* 187 F. 2d 786 (6th Cir. 1951), mentioned in the third part of the Argument of this Petition, arose from a misunderstanding of *Schoenamsgruber* v. *Hamburg American Line (The Oakland),* 294 U. S. 454 (1935), which held in a suit by a passenger for personal injury that a stay pending arbitration under the contract of carraige was not appealable under the predecessor to 28 U.S.C. § 1292(a)(1). This Court stated, 294 U. S. at 457-58 (emphasis added; footnotes omitted):

> Save as therein otherwise specified [28 U.S.C. § 1292(a)] . . . extends only to suits in equity. Its provisions relating to injunctions and receivers were put in present form by the Act of February 13, 1925, 43 Stat. 937 . . . Before that act, appealability was expressly confined to suits "in equity." Its legislative history shows the omission of the phrase was not intended to remove that limitation. While courts of admiralty have capacity to apply equitable principles in order the better to obtain justice, they do not have *general* equitable jurisdiction, and, *except in limitation of liability proceedings,* they do not issue injunctions. The Act of April 3, 1926, 44 Stat. 233 . . . added

> to [28 U.S.C. § 1292(a)] . . . a provision granting appeal "from an interlocutory decree *in admiralty* determining the rights and liabilities of the parties." This specification, taken in connection with the other parts of the section, indicates that Congress did not intend to make appealable any other interlocutory decrees *in admiralty*. . . .

This Court, by ruling on the merits in *Lake Tankers,* and all Courts of Appeals cases except *Emerick* have treated interlocutory appeals from Limitation Act injunctions as appeals "in equity" in the sense used in *The Oakland* opinion.

Owing to the seriously over-burdened state of federal court dockets, it is not surprising that federal appellate judges dislike interlocutory appeals. Nevertheless, if 28 U.S.C. § 1292(a)(1) is to have its course altered and no more to apply to appeals "in equity" from orders modifying Limitation Act injunctions, this Court, not a conflicting, contending group of Courts of Appeals, should be at the helm during the maneuver.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the final order and opinion of the Sixth Circuit.

Respectfully submitted,

W. SCOTT MILLER, JR.
MILLER and MILLER
Suite 602
One Riverfront Plaza
Louisville, Kentucky 40202
(502) 589-6240

Counsel for Petitioner

NATHAN S. LORD
Of Counsel

APPENDIX

APPENDIX

This appendix to the Petition of M/G Transport Services, Inc., for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit contains the text of the authorities cited under "Constitutional and Statutory Provisions and Court Rules Involved" and these parts of the record below (captions omitted from District Court documents):

M/G's Complaint for Exoneration From Limitation or Liability.

District Court's Restraining Order of September 11, 1978.

District Court's Memorandum and Order of July 7, 1980.

District Court's Order of July 7, 1980.

Sixth Circuit's Order of November 17, 1980.

UNITED STATES STATUTES

28 U.S.C. § 1292.

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

28 U.S.C. § 1292.

(a) The courts of appeals shall have jurisdiction of appeals from:

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

28 U.S.C. § 1333.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 183.

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 183.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title.

46 U.S.C. § 185.

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. § 188.

Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.

FEDERAL RULES OF CIVIL PROCEDURE

RULE F—LIMITATION OF LIABILITY

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted, and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage, if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer his interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising

upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

RULE F—LIMITATION OF LIABILITY

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or his property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or his property with respect to any claim subject to limitation in the action.

RULE F—LIMITATION OF LIABILITY

(9) Venue; Transfer. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall

have been sold, the proceeds shall represent the vessel for the purposes of these rules.

ADMIRALTY RULE 54

54. When any ship or vessel shall be libelled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the said act above recited, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sureties for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof

of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post-office, or otherwise, as the court, in its discretion, may direct; and the said court shall, also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

ADMIRALTY RULE 56

56. In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.

UNITED STATES DISTRICT COURT RULES FOR THE WESTERN DISTRICT OF KENTUCKY

RULE 5—ASSIGNMENT OF CASES

(a) Civil Cases at Louisville. All civil cases at Louisville shall be assigned as follows:

3. After any case has been assigned to any member of this Court, he shall have complete charge of the same, but in the event that a judge to whom an action or proceeding has been assigned is disqualified from hearing the same, then such case shall be referred by the Chief Judge to one of the other Judges.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 78-0360-L(B)

In the Matter of the Petition of
M/G TRANSPORT SERVICES, INC.,
a corporation, as owner of the M/V
MARK EASTIN, for exoneration
from or limitation of liability.

COMPLAINT

To The Honorable Judges Of The United States District Court For The Western District Of Kentucky:

The Petition of M/G Transport Services, Inc., a corporation, hereinafter called M/G, as the owner of the M/V MARK EASTIN for exoneration from or limitation of liability, civil and maritime, alleges upon information and belief as follows:

1. This action arises under the laws of the United States providing for limitation of owners' liability (46 U.S.C. Section 181 to 195 inclusive) and various statutes, rules and regulations relating thereto. It is a cause of admiralty and maritime jurisdiction within the meaning of Rule 9(h), Federal Rules of Civil Procedure, and is filed in addition to Rule F of the Supplemental Rules of Admiralty, and within six (6) months after Plaintiff's first receipt of claim.

2. At all times herein mentioned, Plaintiff M/G was and still is a corporation duly organized and existing under the law, with an office and place of business in Cincinnati, Ohio. At said times, Plaintiff was the owner and operator of the M/V MARK EASTIN, which it manned and navigated at its own expense.

3. At all times hereinafter mentioned, and at the time of the maritime casualty, the M/V MARK EASTIN was a steel-hulled, river towboat propelled by two diesel-powered engines, each rated at 2800 horsepower, or a total rated horsepower of 5600. Her registered dimensions were 177 feet in length, 42 feet in beam, and 11.7 feet in depth, and a draft of approximately 8 feet. The vessel had a gross registered tonnage of 1165 tons, and a net registered tonnage of 792 tons. At the time of the maritime casualty, the M/V MARK EASTIN was used for the transportation of barges and cargo on the Ohio River and her navigable tributaries. The Plaintiff, M/G, used due diligence to make the vessel seaworthy; and it was, at the time of the maritime casualty herein mentioned, tight, staunch and strong, fully manned, equipped, and supplied, and in all respects seaworthy and fit for the service in which it was engaged.

4. The voyage on which demands hereinafter set forth allegedly arose, and for which M/G prays exoneration from, or limitation of, liability began on or about August 19, 1977 at or near Gallipolis, Ohio and was to terminate at Johnsonville, Tennessee.

5. On or about August 21, 1977 the M/V MARK EASTIN, downbound on the Ohio River with her tow, arrived at approximately 599.0 near Wootens River Service for supplies and crew change, being approximately opposite the foot of Six Mile Island and at approximately 1440 hours (2:40 p.m. local time). At that time the pilot, Lawrence D. Truman, Jr., came aboard the vessel and took over

as pilot from the captain. Departing Mile 599, the tow proceeded downbound (southbound) at approximately 1450 hours (2:50 p.m. local time). Shortly thereafter the vessel had attained a speed of approximately four to five miles per hour when the pilot noticed a sailboat off the port headed downstream, one of several sailboats involved in a race. This vessel, like other numerous vessels in the harbor, was well clear of the pilot's direction of travel. The sailboat next changed course slightly toward the head of the tow, but still well clear. The pilot immediately brought both engines to neutral in case the sailboat should change course and then started backing to slow the tow even further. At approximately 1500 hours (3:00 p.m. local time) at approximately Mile 600.6 the sailboat suddenly turned hard right on a port tack and immediately began to cross directly into the path of the approaching vessel. The MARK EASTIN at this time was backing full astern, and the pilot was holding the throttle levers down with both hands as hard as possible in an effort to stop the tow. The vessel had almost come to a stop when the sailboat came in contact with the center barge of the tow at approximately 70 feet across the 105 feet wide tow, and was carried under the bow of the starboard lead barge about fifteen feet. As soon as the headway of the tow was stopped, it backed upriver and the sailboat was washed out from under the barge. The pilot immediately notified the Coast Guard and the local authorities. The two occupants of the sailboat were drowned and their remains recovered on August 23, 1977.

6. The said accident or casualty and any loss of life, damage to property, or any expense as a result thereof were not caused or contributed to by any fault, negligence, want of due care on the part of the M/V MARK EASTIN or those in charge of said vessel, or anyone for whom the Plaintiff may be responsible, but occurred either as a result

of factors for which no one was responsible, or were caused by or due to the fault and negligence of the owner and/or operator or operators of the sailboat, and its agent or agents and crew in the following respects, among others:

(a) Failure to maintain an adequate lookout;

(b) Reckless or negligent operation of the sailboat;

(c) Inexperienced crew or pilot of the sailboat;

(d) Failure to abide by the Rules of the Road for the Western Rivers;

(e) Negligence of the occupants of the sailboat in engaging in a race or regatta without obtaining a proper permit from the appropriate government agency;

(f) Failing in other respects which may be shown at the trial.

7. The accident or casualty and any loss of life and property or expenses referred to above were occasioned and occurred without fault on the part of the Plaintiff, M/G, and without the privity and knowledge of the Plaintiff, M/G.

8. The M/V MARK EASTIN has not been attached or arrested in any suit in connection with a claim arising out of said accident or casualty. The following two suits have been filed against M/G by reason of said accident, as well as action styled "Citizens Fidelity Bank & Trust Co., Executor of Thomas L. Shanesy, Deceased, et al. v. Raymond E. Potter, Sr., Administrator" filed in the Jefferson Circuit Court:

(a) Action entitled "Citizens Fidelity Bank and Trust Company, Executor under the Will of Thomas L. Shanesy, deceased; Mary Ellen Shanesy, widow of Thomas L. Shanesy, deceased; Catherine Ann Shanesy, daughter of Thomas

L. Shanesy, deceased; and James W. Shanesy, son of Thomas L. Shanesy, deceased v. M-G Transport Services, Inc.", Civil Action No. C78-0291L(A) in the United States District Court, Western District of Kentucky, at Louisville. The attorney for the plaintiffs is Ann B. Oldfather, firm of Wyatt, Grafton & Sloss, 2800 Citizens Plaza, Louisville, Kentucky, and damages in the sum of $3,757,221.78 are alleged in the Complaint for pain and suffering, deprivation of society, nurture, guidance, love, affection, care, attention, companionship, comfort and protection, and funeral expenses;

(b) Action entitled "Raymond E. Potter, Sr., Administrator of the estate of Martha Jo Kinser, deceased; and Kerry Kinser, son of Martha Jo Kinser, deceased; and Kimberly Kinser, an infant by her next friend, Roy Kinser, daughter of Martha Jo Kinser, deceased v. Citizens Fidelity Bank & Trust Company, Executor under the Will of Thomas L. Shanesy, deceased; and M-G Transport Services, Inc." in the United States District Court, for the Western District of Kentucky, at Louisville, Civil Action No. C78-0306L(A). The attorney for the plaintiffs is Charles I. Sandmann, firm of Sandmann, Dodd & Berman, 100 N. Sixth Street, Louisville, Kentucky, and damages are claimed in the total sum of $1,510,000.00 plus interest.

9. The amount of the claims in the suits already begun against the Plaintiff M/G as set forth above exceed the value of M/G's interest in the M/V MARK EASTIN and pending freight.

10. This Complaint is filed less than six (6) months after the receipt of the first claim in writing. As noted above, M/G has been sued in this district with respect to claims arising out of the accident or maritime casualty.

11. The M/V MARK EASTIN was not damaged in the casualty, and is in service moving barges and cargo on the

Ohio River a d her navigable tributaries. M/G is advised that the value of the M/V MARK EASTIN at the close of the voyage mentioned above would not exceed the sum of $750,413.00 as appears from the Affidavit of Marion S. Webb, a maritime broker, and the pending freight would not exceed the sum of $44,677.62. The entire value of the interest of the Plaintiff, M/G, in the M/V MARK EASTIN and the pending freight at the time of the aforesaid maritime casualty would not exceed the sum of $795,090.62. Upon information and belief, the Plaintiff states that there are no liens upon said vessel prior or paramount to any liens which may have accrued by reason of the matters aforesaid.

12. Plaintiff, M/G, claims exoneration from liability for the losses occasioned by the death of the two persons hereinabove mentioned, and any injuries to said persons which may have been occasioned or incurred by reason of said casualty involving the M/V MARK EASTIN and her tow, and for any and all claims therefor, and Plaintiff alleges that it has valid defenses thereto based on the facts and the law. Plaintiff further claims the benefit of the limitation of liability provided under Title 46 U. S. Code, Sections 181 to 195, inclusive, providing for the limitation of vessel owner liability and of the various statutes, rules and regulations supplemental thereto and amendments thereto; and to that end Plaintiff is ready and willing to proceed according to law and pursuant to the rules and practice of this Court.

13. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, Plaintiff, M/G Transport Services, Inc., prays that:

1. This Court shall cause due apraisement to be made of the amount of value of Plaintiff's interest in the M/V MARK EASTIN and its pending freight.

2. The Court make an Order directing the Plaintiff to file a stipulation with surety to be approved by the Court for the payment into Court of the amount of Plaintiff's interest whenever the Court shall so order.

3. The Court make an Order directing the issuance of a notice to all persons claiming damage for any and all loss, damage, expense or injury of any nature caused by or resulting from the aforesaid accident, citing them and each of them to appear and make due proof of their respective claims, and also to appear and answer the allegations of this Complaint at or before a time certain to be fixed by said notice.

4. The Court make an Order directing that on the giving of such stipulation as may be deemed to be proper or of an ad interim stipulation as offered by Plaintiff an injunction shall issue restraining the prosecution of any and all actions, suits and proceedings to recover damages caused by or resulting from said accident, except in the present proceeding, or of any suit, action or legal proceeding of any nature or description whatsoever in any jurisdiction, against the Plaintiff or its agents or representatives, or any other person whatsoever, or against the M/V MARK EASTIN in respect of any claim or claims arising out of or resulting from said accident.

5. The Court in this proceeding will adjudge that:

(a) The Plaintiff and the M/V MARK EASTIN are not liable to any extent for any loss, damage, expense or injury, nor for any of the claims whatsoever in any way arising out of or in consequence of the aforesaid casualty;

(b) If the Plaintiff shall be adjudged liable to any extent in the premises, then that such liability be limited to

the amount or value of its interest in the M/V MARK EASTIN at the close of said voyage and its freight pending, and as such values may be determined by the appraisement of such interest as hereinabove prayed, and that the money paid or secured to be paid into Court as aforesaid be divided pro rata among the claimants in proportion to the amount of their respective claims duly approved and confirmed, saving to all parties any priority to which they may be legally entitled, and that a decree may be entered discharging Plaintiff and the M/V MARK EASTIN from all further liability and forever enjoining the filing and prosecution of any claims against the Plaintiff, M/G Transport Services, Inc., and the M/V MARK EASTIN with reference to the matters and happenings recited in the above and foregoing Complaint.

6. Plaintiff may have such other, further and different relief as may be just.

(s) John A. Lloyd, Jr.
F. Michael Larocca
610 Merchantile Library Building
Cincinnati, Ohio 45202

(s) W. Scott Miller, Jr.
Miller & Miller
Suite 602, One Riverfront Plaza
Louisville, Kentucky 40202
(502) 589-6240

Attorneys for Plaintiff

State of Ohio }
County of Hamilton } ss

Richard A. Hain, being duly sworn, deposes and says that he is the Executive Vice-President of M/G Transport Services, Inc., a corporation, the Plaintiff herein; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief; and that as to those matters he believes it to be true;

That the sources of deponent's information that M/G Transport Services, Inc. is a corporation, and deponent is an officer thereof, to-wit, its Executive Vice President;

That the sources of deponent's information and the grounds of his belief as to all matters not stated in the Complaint to be alleged upon his own knowledge, are reports made to him by employees and records of said corporation.

(s) Richard A. Hain

Subscribed and sworn to before me this 7th day of September, 1978 by Richard A. Hain.

(s) Barbara Bison Ford
Attorney at Law
Notary Public, State of Ohio
My Commission has no expiration date
Section 147.03 O. R. C.

RESTRAINING ORDER

This matter having come before the Court on motion of W. Scott Miller, Jr., of Miller & Miller, attorneys for Petitioner, and the Court being sufficiently advised,

It Is Ordered that the institution and presentation of any and all suits, actions or legal proceedings of any nature or description whatsoever, except in this petition of M/G Transport Services, Inc., a corporation, for exoneration from or limitation of liability, against the M/V MARK EASTIN and against the Petitioner, M/G Transport Services, Inc., a corporation owner and operator of the M/V MARK EASTIN, in respect of any claim against said vessel or against said corporation as owner and operator of said vessel, arising out of or connected with the maritime casualty which occurred on August 21, 1977 while the M/V MARK EASTIN was proceeding down river at approximately Mile 600.8 on the Ohio River, involving the maritime casualty with an unnamed sailboat, and all claimants with claims arising out of or related to said maritime casualty are hereby stayed and restrained from filing suits or further prosecuting existing suits against said vessel or Petitioner as owner and operator of said vessel and/or taking part in any administrative action or adversary proceeding or prosecuting their respective claims until the hearing and determination of this proceeding and

It Is Further Ordered that the service of this order as a restraining order be made on the parties who have instituted legal proceedings against Petitioner or the M/V MARK EASTIN, by serving certified copies of this order on their respective attorneys by certified mail, and on all ther claimants by mailing certified copies of this order by certified mail to the following parties: Ann Oldfather, Wyatt, Grafton & Sloss, 2800 Citizens Plaza, Louisville, Ky. 40202, Attorney for Citizens Fidelity Bank & Trust

Company, Executor under the Will of Thomas L. Shanesy, deceased; Mary Ellen Shanesy, Widow of Thomas L. Shanesy, deceased; Catherine Ann Shanesy, Daughter of Thomas L. Shanesy, deceased; and James W. Shanesy, son of Thomas L. Shanesy, deceased; and upon Charles I. Sandmann, Sandmann, Dodd & Berman, 100 N. Sixth Street, Louisville, Ky. 40202, Attorney for Raymond E. Potter, Sr., Administrator of the Estate of Martha Jo Kinser, deceased; Kerry Kinser, son of Martha Jo Kinser, deceased; and Kimberly Kinser, an infant by her next friend, Roy Kinser, daughter of Martha Jo Kinser, deceased; and upon Victor W. Ewen, Ewen, MacKenzie & Peden, Commonwealth Building, Louisville, Ky 40202, Attorney for Raymond E. Potter, Jr., Administrator of the Estate of Martha Jo Kinser, Deceased.

It Is Further Ordered that the above named parties and claimants be and the same are hereby restrained and enjoined from initiating or prosecuting any legal or administrative actions or any other adversary proceedings relating to the liability of the M/V MARK EASTIN with respect to the maritime casualty of August 21, 1977 herein referred to.

_____

United States District Judge

Dated: September 11, 1978

MEMORANDUM AND ORDER—Entered July 7, 1980

For convenience, in this memorandum decedents' personal representatives will be referred to as plaintiffs and M/G Transport Services, Inc. will be referred to as M/G.

The matter is before the Court on the motion of plaintiffs to consolidate for trial on the issues of liability and damages.

The action arises out of a collision between M/G's tow and a sailboat occupied by plaintiffs' decedents. The collision occurred at River Mile 600.6, which is about opposite the Louisville Water Company Tower.

In Action No. 78-0360-L(B) M/G has petitioned for exoneration from or limitation of liability, 46 U.S.C. Section 185. Action No. 78-0306-L(B) is an action by Raymond Potter, Administrator of the Estate of Martha Jo Kinser, and 2 of Ms. Kinser's children against M/G and Citizens Midelity Bank and Trust Company, the Executor of the Estate of Thomas Shanesy, seeking damages for the death of Ms. Kinser. Action No. 78-0291-L(B) is an action by Citizens Fidelity Bank and Trust Company, Executor of the Estate of Thomas Shanesy, Shanesy's widow and 2 of his children against M/G. The Shanesy plaintiffs assert no claim against Kinser's estate. The Court's jurisdiction in the last 2 actions is invoked under 28 U.S.C. Section 1333(1).

M/G argues that its petition for limitation or exoneration must be tried to the Court before plaintiffs may have their common law actions tried to a jury. The Court is not persuaded that such a procedure is in the best interest of judicial economy. Should the jury absolve M/G from any liability for the tragedy, M/G's petition is moot. On the other hand, should the jury assess all or part of the liability against M/G, an injunction will issue enjoining plaintiffs, or any of them, from enforcing any judgment entered

on the jury verdict until M/G's petition for exoneration is tried to the Court.

We believe that this procedure may be justified by the language in *Lake Tankers Corporation* v. *Henn,* 354 U. S. 147, 77 S. Ct. 1269 (1957):

> "For us to expand the jurisdictional provisions of the Act to prevent respondent from now proceeding in her state case would transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights, even where the limitation fund is known to be more than adequate to satisfy all demands upon it. The shipowner's right to limit liability is not so boundless. The Act is not one of immunity from liability but of limitation of it and we read no other privilege for the shipowner into the language over and above that granting him limited liability. In fact, the Congress not only created the limitation procedure for the primary purpose of apportioning the limitation fund among the claimants where that fund was inadequate to pay the claims in full, but it reserved to such suitors their common-law remedies. 63 Stat. 101, 28 U.S.C. § 1333, 28 U.S.C.A. § 1333. In view of this explicit mandate from the Congress the respondent must not be thwarted in her attempt to employ her common-law remedy in the state court where she may obtain trial by jury.
>
> The state proceeding could have no possible effect on the petitioner's claim for limited liability in the admiralty court and the provisions of the Act, therefore, do not control. Langnes v. Green, 1931, 282 U. S. 531, 539-540, 51 S. Ct. 243, 246, 75 L. Ed. 520. It follows that there can be no reason why a shipowner, under such conditions, should be treated any more favorably than an airline, bus, or railroad com-

> pany. None of them can force a damage claimant to trial without a jury. They, too, must suffer a multiplicity of suits. Likewise, the shipowner, so long as his claim of limited liability is not jeopardized, is subject to all common-law remedies available against other parties in damage actions. The Act, as we have said, was not adopted to insulate shipowners from liability but merely to limit it to the value of the vessel and the pending freight." 354 U. S. at 152, 77 S. Ct. at 1272.

The Court concludes that the motion of the plaintiffs for consolidation and jury trial should be granted, and the motion of the defendant, M/G Transport Services, Inc., for a trial on its petition for limitation or exoneration should be denied until such time as plaintiffs' common-law actions have been concluded.

The Court is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate determination of this litigation.

It Is So Ordered this 7th day of July, 1980.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:
Counsel of record

ORDER—Entered July 7, 1980

The above-styled cases came on for pre-trial conference in the Court's chambers at Louisville, Kentucky, on Monday, July 7, 1980, and there appeared Mr. Ed Zingman, Ms. Ann Oldfather, Mr. Charles Sandmann, Mr. Harry Herren, Jr., and Mr. W. Scott Miller, Jr.

It Is Ordered that these cases be set for Trial Before a Jury on the issues of liability and damages, on December 1, 1980, at the hour of 9:30 a.m. The case will then be tried on the issue of limitation, if necessary.

Counsel shall submit to the Court ten days prior to trial, all voir dire questions to be asked of the prospective jury panel.

It Is Further Ordered that fifteen days before trial the parties shall (1) exchange a list of special damages if any such damages are claimed (2) exchange a list of witnesses who may testify, and (3) produce for inspection by opposing party all exhibits that are to be placed in evidence. Unless written objection to the authenticity and/or admissibility of an exhibit is made to the Court five days before trial, the authenticity and/or admissibility of the exhibit is admitted. In the absence of good cause no witness will be permitted to testify and no exhibit will be offered in evidence except upon compliance with the conditions of this order.

It Is Further Ordered that fifteen days before trial counsel for the parties shall meet, or confer by telephone, for a final discussion of (1) possibility of settlement, and (2) preparation of a written stipulation of all possible facts, and shall advise the Court, by joint or separate writing that such conference was held and the results thereof.

It Is Further Ordered that seven days before trial (1) plaintiff's counsel shall submit to the Court proposed

instructions with the right of defendant's counsel to submit his proposed instructions, if any, four days before trial. (2) Plaintiff's counsel shall submit memorandum brief on any unusual problems anticipated to arise in the trial of the action and defendant's counsel may, within four days, reply thereto should he desire.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Dated: July 7, 1980.
Copies to All Counsel of Record.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-3553

IN THE MATTER OF THE PETITION OF M/G TRANSPORT SERVICES, INC., A CORPORATION, AS OWNER OF THE M/V MARK EASTIN, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

M/G TRANSPORT SERVICES, INC., - *Petitioner-Appellant*

v.

CITIZENS FIDELITY BANK & TRUST AND RAYMOND E. POTTER, - - - - - *Appellees*

ORDER—Filed ~~May~~ Nov. 17, 1980

BEFORE: WEICK, MARTIN and JONES, Circuit Judges.

This matter has come before the Court upon the motion of Citizens' Fidelity Bank (hereafter Citizens) to dismiss the appeal of M/G Transport Services, Inc. (hereafter M/G) and M/G's response thereto. M/G has also filed a motion for stay of proceedings pending appeal.

It appears that the action arises out of a 1977 collision between M/G's tow and barge and a sailboat. The sailboat's occupants were both killed. Citizens represents the estate of one of the occupants. Both estates filed wrongful death actions in diversity in the district court against M/G. The district court's jurisdiction was also invoked under 28 U.S.C. Section 1333(1). Thereafter MG petitioned the

court for limitation or exoneration of liability pursuant to 46 U.S.C. §185. At that time M/G sought and obtained an ex parte restraining order restraining "all claimants with claims arising out of or related to said maritime casualty . . . from filing suits or further prosecuting existing suits against said vessel or petitioner as owner and operator of said vessel and/or taking part in any administrative action or adversary proceeding or prosecuting their respective claims until the hearing and determination of this proceeding."

In June, 1980, Citizens moved the district court for an order consolidating the diversity actions and setting the matter for trial on the issues of liability and damages stipulating that "in the event damages were awarded in excess of the amount of claimed limitation, the issues of limitation to be tried by the court." The district court, on July 7, 1980, granted Citizens' motion and set the matter for trial December 1, 1980 reserving to itself the right to try the issue of limitation if necessary. It also certified its order for permissive appeal pursuant to 28 U.S.C. 1292(b).

M/G thereafter filed a notice of appeal to this Court. Citizens moved to dismiss on the ground that M/G had failed to comply with Rule 5 Federal Rules of Appellate Procedure; and on the ground the order appealed from was interlocutory and not appealable under either 28 U.S.C. §1292(a)(3) or 1292(a)(1). M/G for its part asserts that it is permitted to appeal the district court order as of right pursuant to 28 U.S.C. §1292(a)(1).

This Court has held that in admiralty cases, orders consolidating actions for trial and orders refusing to enjoin further proceedings where there is a pending limitation action are preliminary steps to bring both actions to final issue and are not appealable pursuant to 28 U.S.C. 1292 (a)(3). *Emerick* v. *Lambert,* 187 F. 2d 786 (6th Cir. 1951). Further the general view is that orders relating to the delay

of actions before admiralty courts, pending the outcome of some proceeding, are not appealable pursuant to 28 U.S.C. 1292(a)(1). *Penoro* v. *Rederi A/B Disa,* 386 F. 2d 125, *cert. denied sub. nom Rederi A/B Disa* v. *Cunard SS Co.,* 389 U. S. (1967). The general principle here is that where a court stays a proceeding on its own docket it is not an injunction but merely a calendar order issued under the courts inherent power to regulate its own business. *Penoro* v. *Rederi A/B Disq, supra.* Only where a major portion of the relief sought by the complaint is granted and then modified will an appeal lie under 1292(a)(1). Pretrial management orders like the one at bar are generally excepted. See *American Motors Corporation* v. *F.T.C.,* 601 F. 2d 1329 (6th Cir. 1979).

Accordingly, the Court is without jurisdiction to entertain the present appeal. Therefore it is ORDERED that the motion to dismiss be and hereby is granted. It is further ORDERED that the motion for stay be denied as moot.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

No. 80-1361

FILE
MAR 13 19
ALEXANDER L. S
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

M/G TRANSPORT SERVICES, INC.
Petitioner

v.

CITIZENS FIDELITY BANK AND TRUST COMPANY, Executor Under the Will of Thomas L. Shanesy, MARY ELLEN SHANESY, CATHERINE ANN SHANESY and JAMES W. SHANESY

RAYMOND E. POTTER, SR., Administrator of the Estate of Martha Jo Kinser
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

EDGAR A. ZINGMAN,
Counsel of Record
ANN B. OLDFATHER
2600 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235
HARRY K. HERREN, JR.
2510 First National Tower
Louisville, Ky. 40202
(502) 585-3321
Counsel for Respondents, Citizens Fidelity Bank and Trust Company, Executor Under the Will of Thomas L. Shanesy, Mary Ellen Shanesy, Catherine Ann Shanesy and James W. Shanesy

WYATT, TARRANT & COMBS
of Counsel

QUESTIONS PRESENTED

Petitioner appealed from the trial court's order docketing Respondents' claims for jury trial and providing that any recovery would be enjoined pending trial to the Court of Petitioner's statutory claim for exoneration from or limitation of liability.

1. Was the trial court's order docketing for jury trial an "interlocutory decree ... determining the rights and liabilities of the parties" which would be appealable under 28 U.S.C. §1292(a)(3)?

Respondents state that it was not. The United States Court of Appeals for the Sixth Circuit agreed. There is no conflict among the federal courts of appeal. Petitioners now also appear to agree.

2. Was the trial court's order docketing for jury trial an order providing for the orderly administration of judicial proceedings not tantamount to an order "modifying, refusing or dissolving" injunctive relief within the meaning of 28 U.S.C. §1292(a)(1)?

Respondents maintain that it was. The United States Court of Appeals for the Sixth Circuit agreed. There is no conflict among the federal courts of appeal.

PARTIES BELOW

In addition to those parties identified by Petitioner and aligned with Citizens Fidelty Bank and Trust Company, Executor under the Will of Thomas L. Shanesy, Respondents herein and parties below were Mary Ellen Shanesy, widow of Thomas L. Shanesy, Catherine Ann Shanesy, daughter of Thomas L. Shanesy and James W. Shanesy, son of Thomas L. Shanesy.

The balance of the statements made by Petitioner, M/G Transport Services, Inc. ("M/G") is accepted.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	[i]
PARTIES BELOW	[ii]
TABLE OF AUTHORITIES	[iii]
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	
1. The Trial Court's Order Docketing for Jury Trial Was Not Appealable under 28 U.S.C. §1292(a)(3)	1
2. M/G's Statutory Rights under the Limitation Act Have Been Fully Protected	2
3. The Subject Order Is Not Appealable under 28 U.S.C. §1292(a)(1)	3
CONCLUSION	6

TABLE OF AUTHORITIES

	Page
CASES:	
Emerick v. Lambert, 187 F.2d 786 (6th Cir. 1951)	2
Enelow v. New York Life Insurance Company, 293 U.S. 379 (1935)	3
Ettelson v. Metropolitan Life Insurance Company, 317 U.S. 188 (1942)	3
W. R. Grace & Company v. Trawler Crustamar, 571 F.2d 318 (5th Cir. 1978)	4
Lake Tankers v. Henn, 354 U.S. 147 (1957)	3
Landis v. North American Company, 299 U.S. 248 (1936)	4-5
The Maria, 67 F.2d 571 (2nd Cir. 1933)	1
Moragne v. States Marine Lines, 398 U.S. 375 (1970)	2
Penoro v. Rederi A/B Disa, 376 F.2d 125 (2nd Cir. 1967) *cert. den.*, 389 U.S. 852 (1967)	4
Schoenamsgruber v. Hamburg American Line, 294 U.S. 454 (1935)	4
Tradax Limited v. M.V. Holendrecht, 550 F.2d 1337 (2nd Cir. 1977)	4
United States v. Chelsea Towers, Inc., 404 F.2d 329 (3rd Cir. 1968)	4
United States v. The Lake George, 224 F.2d 117 (3rd Cir. 1955)	1
STATUTES:	
28 U.S.C. §1292(a)(1)	1,3,5
28 U.S.C. §1292(a)(3)	1,2
28 U.S.C. §1292(b)	5
COURT RULES:	
F. R. Civ. P. 65(b)	2
TREATISES:	
9 Moore's Federal Practice ¶110.19[3], pp. 210-213..	1
9 Moore's Federal Practice ¶110.19[3], pp. 215-216..	4
9 Moore's Federal Practice ¶110.20[4.-2], p. 250	5

COUNTERSTATEMENT OF THE CASE

M/G's statement of the case is accepted for purposes of this Brief in Opposition.

SUMMARY OF ARGUMENT

M/G apparently makes no attempt to argue a right to appeal under 28 U.S.C. §1292(a)(3). Its attempted appeal was from the order entered in its admiralty action and was based solely on 28 U.S.C. §1292(a)(1). To prevail M/G must show that the order docketing for jury trial was tantamount to an order "modifying, refusing or dissolving" injunctive relief.

The opinions of this Court and of all the federal courts of appeal are in accord: such orders in admiralty actions are not appealable. M/G has not been denied any of the relief sought in its complaint so that appeal would not lie in any event.

Argument

1. The Trial Court's Order Docketing For Jury Trial Was Not Appealable Under 28 U.S.C. §1292(a)(3).

While it is not completely clear from the Petition, M/G apparently rests its right to appeal exclusively upon 28 U.S.C. §1292(a)(1). Petition for Writ of Certiorari, pp. 5-6. M/G recognizes that the historical application of 28 U.S.C. §1292(a)(3) has been to allow only the appeal of a final determination of liability before the determination of damages in a bifurcated proceeding. Petition for Writ of Certiorari, p. 9. This view is correct. *United States v. The Lake George,* 224 F.2d 117 (3rd Cir. 1955), *The Maria,* 67 F.2d 571 (2nd Cir. 1933).[1]

---

[1] While the applicability of 28 U.S.C. §1292(a)(3) has been expanded to include situations other than the final determination of liability in a bifurcated trial, it is still properly invoked only when the merits of the matter have been addressed so as to determine the "rights and liabilities" of the parties, 28 U.S.C. §1292(a)(3), 9 *Moore's Federal Practice,* ¶110.19[3], pp. 210-213.

As previously held by the Sixth Circuit in *Emerick v. Lambert,* 187 F.2d 786 (6th Cir. 1951), as resolved against M/G in this proceeding and as apparently admitted by M/G in its Petition, the subject order of the trial court is not appealable under 28 U.S.C. §1292(a)(3).

2. M/G's Statutory Rights Under The Limitation Act Have Been Fully Protected.

Prior to filing its Complaint for exoneration from or limitation of liability, M/G was faced with wrongful death claims under the general maritime law by the estates and dependants of Shanesy and Kinser, in which actions jury trials had been demanded, *cf., Moragne v. States Marine Lines,* 398 U.S. 375 (1970). Upon filing its Complaint for exoneration from or limitation of liability, M/G obtained an ex parte temporary restraining order prohibiting the filing or further prosecution of claims against M/G.[2]

The present issue centers around Respondents' demand for a jury trial on the common law wrongful death claims and M/G's demand for a prior trial to the court on its petition for exoneration from or limitation of liability. On Shanesy's motion all three actions had been consolidated for purposes of discovery; entries in one action were effective as entries in the other two actions.

In order to bring these cases to a conclusion, the trial court placed the Shanesy and Kinser claims on the jury trial docket by the following order and upon the indicated condition:

> M/G argues that its petition for limitation or exoneration must be tried to the Court before plaintiffs may have their common law actions tried to a jury. The Court is not persuaded that such a procedure is in the best interest of judicial economy. Should the jury absolve M/G from any liability for the tragedy, M/G's petition is moot. *On the other hand, should the jury assess all or part of the liability against M/G, an injunction will issue enjoining plaintiffs, or any of them, from enforcing any judgment entered on the jury verdict until M/G's petition for exoneration is tried to the Court* (emphasis added).

---

[2] It is interesting to note that no request has ever been made for the entry of a temporary or permanent injunction of similar tenor. The temporary restraining order was entered on September 11, 1978, was effective for ten days only and has never been extended. F.R.Civ.P. 65(b).

> Memorandum and Order, entered July 7, 1980; Appendix, Petition for Writ of Certiorari, pp. 36-37.
>
> And, in an Order of the same date:
>
> > It is Ordered that these cases be set for Trial before a Jury on the issues of liability and damages, on December 1, 1980, at the hour of 9:30 A.M. The case will then be tried on the issue of limitation, if necessary.
> >
> > Order, entered July 7, 1980; Appendix, Petition for Writ of Certiorari, p. 39.

The procedure utilized by the district court was in conformance with this Court's opinion in *Lake Tankers v. Henn,* 354 U.S. 147 (1957). The attempted appeal ensued [the trial date now is June 9, 1981].

Perhaps it is felicitous that all three proceedings are within the pre- and post-trial management powers of one federal judge. Felicity or not, the fact remains that all of the relief afforded M/G under the Limitation of Liability Act is still available to it. The trial court has done nothing other than determine the sequence in which the actions before it shall proceed; M/G has been exposed to no additional liability or risk of liability nor has it been denied any statutory right to which it is entitled.

3. The Subject Order Is Not Appealable Under 28 U.S.C. §1292(a)(1).

Appeals of interlocutory orders granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions are allowed under 28 U.S.C. §1292(a)(1). An appeal as of right would exist in the present matter only if the District Court modified an "injunction" or if the admiralty/civil practice historical distinction is such as to allow the appeal.

In admiralty proceedings, 12 U.S.C. §1292(a)(1) is more narrowly interpreted than in ordinary civil actions. In ordinary civil actions a doctrine familiarly termed the *Enelow-Ettelson* rule[3] allows for the appeal of orders granting or denying jury

---

[3] *Enelow v. New York Life Insurance Company,* 293 U.S. 379 (1935), *Ettelson v. Metropolitan Life Insurance Company,* 317 U.S. 188 (1942).

trial even though such orders are not couched as true injunctions. Admiralty actions, however, have been spared the application of this much critized and troublesome rule.

As stated in 9 *Moore's Federal Practice,* ¶110.19 [3] at pp. 215-216:

> But while orders respecting true injunctions in limitation proceedings in admiralty are appealable under 28 U.S.C. §1292(a)(1), it is clear that the troublesome Enelow-Ettelson rule is not applicable to admiralty cases ... the Enelow-Ettelson rule permits appeals under §1292(a)(1) from orders that do nothing more than determine how the action is to proceed.

And in *Penoro v. Rederi A/B Disa,* 376 F.2d 125, 129 (2nd Cir. 1967), *cert. den.* 389 U.S. 852 (1967) wherein the court states:

> Orders by courts in admiralty granting or denying stays of proceedings before them have been spared the confusion of Enelow-Ettelson-Morgantown-Baltimore Contractors. Such orders have consistently been held not to be injunctions within the meaning of §1292(a)(1).[4]

The foregoing comments and decision are based upon the authority of *Schoenamsgruber v. Hamburg American Line,* 294 U.S. 454 (1935).

Absent the *Enelow-Ettelson* rule, which does not apply in an admiralty case, the district court has the inherent power to set the sequence of proceedings pending before it to await the disposition of other related actions in the same court. *United States v. Chelsea Towers, Inc.,* 404 F.2d 329 (3rd Cir. 1968). Such orders are:

> "...incidental to the power inherent in every court to control the disposition of the causes on its

---

[4] Accord: *W. R. Grace & Company v. Trawler Crustamar,* 571 F.2d 318 (5th Cir. 1978); *Tradax Limited v. M.V. Holendrecht,* 550 F.2d 1337 (2nd Cir. 1977).

> docket with economy of time and effort for itself, for counsel, and for litigants. How this can be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North American Company.*, 299 U.S. 248, 254-255 (1936).

As stated in 9 *Moore's Federal Practice,* ¶110.20 [4.-2], p. 250:

> An order granting or denying such a stay is not ordinarily regarded as the grant or denial of an injunction. This is so whether the prior action is pending in a state court, another federal court, or in the same federal court. The stay is an ordinary interlocutory order. As such, it is potentially reviewable under 28 U.S.C. §1292(b), and mandamus will lie to correct an abuse of discretion. But it is not reviewable as of right under 28 U.S.C. §1292(a)(1).

The subject orders of the Trial Court are not appealable under 28 U.S.C. §1292(a)(1).

CONCLUSION

There is no conflict between the circuits nor is there any serious or important issue presented. Petitioner's statutory right to limitation has not been effected by the district court's order. No injunction has been modified, dissolved or refused within the meaning of 28 U.S.C. §1292(a)(1), the only basis upon which Petitioner sought review. All that is involved here is a trial court order setting forth the sequence in which two cases will be tried.

Respondents, Citizens Fidelity Bank and Trust Company Executor under the Will of Thomas L. Shanesy, Mary Ellen Shanesy, Catherine Ann Shanesy and James W. Shanesy, respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

EDGAR A. ZINGMAN,
Counsel of Record
ANN B. OLDFATHER
2600 Citizens Plaza
Louisville, Kentucky 40202
(502) 588-5235
HARRY K. HERREN, JR.
2510 First National Tower
Louisville, Ky 40202
(502) 585-3321
Counsel for Respondents,
Citizens Fidelity Bank,
Executor under the Will of
Thomas L. Shanesy,
Mary Ellen Shanesy,
Catherine Ann Shanesy and
James W. Shanesy

Office-Supreme Court
FILED
MAR 25 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1361

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

M/G TRANSPORT SERVICES, INC. - - Petitioner

versus

CITIZENS FIDELITY BANK AND TRUST CO., Executor Under the Will of Thomas L. Shanesy,
MARY ELLEN SHANESY,
CATHERINE ANN SHANESY,
JAMES W. SHANESY, and
RAYMOND E. POTTER, SR., Administrator of the Estate of Martha Jo Kinser - - Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

W. SCOTT MILLER, JR.
MILLER & MILLER
Suite 602, One Riverfront Plaza
Louisville, Kentucky 40202
(502) 589-6240
Counsel for Petitioner
M/G Transport Services, Inc.

NATHAN S. LORD
Of Counsel

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

TABLE OF AUTHORITIES

Cases:

PAGE

Emerick v Lambert, 187 F. 2d 786 (6th Cir. 1951).. 3

W. R. Grace & Company v. Trawler Crustamar, 571 F. 2d 318 (5th Cir. 1978) 3

Lake Tankers v. Henn, 354 U. S. 147 (1957) 3

Penoro v. Rederi A/B Disa, 376 F. 2d 125 (2nd Cir. 1967) cert. den., 389 U. S. 852 (1967) 3

Tradax Limited v. M/V Holendrecht, 550 F. 2d 1337 (2nd Cir. 1977) 3

United States v. Chelsea Towers, Inc., 404 F. 2d 329 (3rd Cir. 1968) 3

Statutes:

28 U.S.C. § 1292(a)(1) 1, 3, 4

46 U.S.C. § 185 .....1, 2, 3

Court Rules:

Fed. R. Civ. P. Supp. F(3) 2

Treatises:

3 I. Hall, A. Sann, K. Halajean, N. Golden, B. Chase and J. Grieder *Benedict on Admiralty* 8-122 (7th Ed. 1980) 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1361

M/G TRANSPORT SERVICES, INC. - - *Petitioner*

v.

CITIZENS FIDELITY BANK AND TRUST CO., Executor Under the Will of Thomas L. Shanesy,
MARY ELLEN SHANESY,
CATHERINE ANN SHANESY,
JAMES W. SHANESY, and
RAYMOND E. POTTER, SR., Administrator of the Estate of Martha Jo Kinser - *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

Contrary to the statements made by Respondents in their Brief in Opposition, the Order docketing the case for jury trial is tantamount to an order modifying, refusing, or dissolving injunctive relief as clearly set out by the Limitation of Liability Act, 46 U.S.C. § 185. An opinion of this Court and most opinions of federal courts of appeal are in accord with Petitioner's position that such orders in limitation actions are appealable under 28 U.S.C. § 1292(a)(1).

With the timely filing of the limitation action in the United States District Court for the Western District of Kentucky, an injunction was issued by that Court enjoining "any and all suits, actions, or legal proceedings of any nature or description whatsoever except in this Petition of M/G Transport Services, Inc., a corporation, for exoneration from or limitation of liability against the M/V MARK EASTIN and against the Petitioner, M/G Transport Services".[1]

Respondents' footnote two on page two of the Brief in Opposition to the Petition for a Writ of Certiorari implies the restraining order was limited to ten days, while that restraining order is good until the termination of the exoneration or limitation proceedings; Fed. R. Civ. P. Supp. F (3); 46 U.S.C. § 185 (final sentence).

At the bottom of Page 2 of Respondents' Brief in Opposition to the Petition for Writ of Certiorari in the italicized portion of the quotation of the district court's order of July 7, 1980 appears the vice of the case below:

> *"Should the jury assess all or part of the liability against M/G, an injunction will issue enjoining plaintiffs, or any of them, from enforcing any judgment entered on the jury verdict until M/G's petition for exoneration is tried to the court."*

Exoneration IS the same issue as whether M/G is liable to Respondents, or either, for a maritime tort. If exoneration is tried to the court, as it should be in

---

[1]Restraining Order fully set out in Pages 34 and 35 of the Appendix filed with the Petition for Writ of Certiorari.

a multi-claim, inadequate fund case, there is nothing for a jury to do.

Petitioner seeks relief in this court in order to bring the foregoing issue before the Sixth Circuit. When the district court made that order, it nullified the statutory command, 46 U.S.C. § 185, that the wrongful death actions "shall cease".

An admiralty court has always had the power to stay its hand while parties proceed to arbitration without the need for a party to ask a court of equity for a stay of the admiralty proceedings. The courts of appeals cases cited on page four of the Brief in Opposition to the Petition for Writ of Certiorari so indicate. *Penoro* v. *Rederi A/G Disa,* 376 F. 2d 125 (2nd Cir.) *cert. denied,* 389 U. S. 852 (1967); *W. R. Grace & Co.* v. *Trawler Crustamar,* 571 F. 2d 318 (5th Cir. 1978); *Tradax Limited* v. *M/V Holendrecht,* 550 F. 2d 1337 (2nd Cir. 1977); *United States* v. *Chelsea Towers, Inc.,* 404 F. 2d 329 (3rd Cir. 1968).

None of the cases cited by Respondents, except *Emerick* v. *Lambert,* 187 F. 2d 786 (6th Cir. 1951), hold that orders modifying exoneration or limitation proceedings are not appealable under 28 U.S.C. § 1292(a)(1).

3 I. Hall, A. Sann, K. Halajran, N. Golden, B. Chase and J. Grieder *Benedict on Admiralty* 8-122 (7th Ed. 1980) states (footnote 9 citing ten cases including *Lake Tankers Corp.* v. *Henn,* 354 U. S. 147 (1957) is omitted):

"An order refusing to modify, dissolve or dismiss a restraining order or allowing such modification, dissolution or dismissal of the limitation injunction is appealable under 28 U.S.C. § 1292(a)(1)."

Respectfully submitted,

W. SCOTT MILLER, JR.
MILLER & MILLER
Suite 602, One Riverfront Plaza
Louisville, Kentucky 40202
(502) 589-6240

Counsel for Petitioner,
M/G Transport Services, Inc.

NATHAN S. LORD
Of Counsel